4-1-2003

A Matter of Constitutional Luck: The General Applicability Requirement in Free Exercise Jurisprudence

Christopher C. Lund
U.S. Court of Appeals for the Sixth Circuit, lund@wayne.edu

A MATTER OF CONSTITUTIONAL LUCK: THE GENERAL APPLICABILITY REQUIREMENT IN FREE EXERCISE JURISPRUDENCE

CHRISTOPHER C. LUND*

In 1990, the Supreme Court altered the doctrinal landscape of free

* Law Clerk to the Honorable Karen Nelson Moore, U.S. Court of Appeals for the Sixth Circuit. I would like to thank Christie Cardon, Richard Duncan, Bruce Gottlieb, Kerry Kornblatt Jowers, Brian Leiter, Bernadette Meyler, and Lawrence Sager. Their valuable comments have enriched this piece in many ways. Thanks and admiration must go in particular to Douglas Laycock, who has been a patient mentor for me in many things, including this piece.

exercise jurisprudence in *Employment Division v. Smith*.[1] Before *Smith*, federal free exercise cases had been governed by the doctrine of *Sherbert v. Verner*;[2] laws burdening religious exercise had to be justified by a compelling state interest. In *Smith*, however, the Court articulated a new test, holding that the government need not have a compelling state interest as long as the law burdening religious practice is neutral and generally applicable.[3]

Smith incensed much of the academic community, who complained that it was out of line with the normal judicial constraints: case precedent, original intent, and textual language.[4] Others feared the effects *Smith* would have on religious communities; they argued that the principles laid out in *Smith* could not be counted on even to prevent religious persecution.[5]

But the vitriolic attacks against *Smith* have decreased in fury, as one would expect; the Supreme Court has given no sign that it will change its mind, and so both practitioners and academics have, quite sensibly, thrown their efforts into making the *Smith* test as protective as possible. In practice, these efforts have been attempts to attack laws as being not generally applicable. Essentially, every time a rule has an exception for some non-religious reason,[6] a religious claimant can argue—perhaps successfully, perhaps not—that making an exception for some secular reason and not making a religious exception effectively discriminates against religious observers. In this manner, the general applicability requirement becomes an expansive

1. 494 U.S. 872 (1990).

2. 374 U.S. 398 (1963).

3. *See Smith*, 494 U.S. at 886 n.3 ("[G]enerally applicable, religion-neutral laws that have the effect of burdening a particular religious practice need not be justified by a compelling governmental interest . . . .").

4. *See, e.g.*, Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1; Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109 (1990). *See also* James E. Ryan, Note, Smith *and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1409 n.15 (1992) (collecting the scholarly criticisms of *Smith*). Even those that supported the result in *Smith* often refused to support its reasoning. *See* William P. Marshall, *In Defense of* Smith *and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308, 308-09 (1991) (arguing that *Smith* was "neither persuasive nor well-crafted" and that it exhibited "a shallow understanding of free exercise . . . precedent").

5. *See* Laycock, *supra* note 4, at 4.

6. It is the convention to call an exception for a non-religious reason, a "secular exception." Of course, this distinction is a gross oversimplification; one reason is that religious groups often benefit by "secular exceptions" because they too have non-religious needs. Yet the shorthand has become dominant and will be followed here, despite its questionable accuracy.

form of a disparate-treatment right.

This has seemed very promising for practitioners and academics who favor a strong Free Exercise Clause. Recent lower court cases, such as *Fraternal Order of Police v. Newark*,[7] *Tenafly Eruv Association, Inc. v. Borough of Tenafly*,[8] and *Rader v. Johnston*,[9] have given the idea that a broad enough conception of the general applicability requirement can sufficiently protect religious observers. Thus, the current debate has focused on the internal contours of the general applicability requirement: When does a secular exception necessitate a religious exception? How significant does the secular exception have to be in terms of the rule before a religious exception becomes a constitutional right?

The understanding of the general applicability requirement underpinning these debates is, I contend, a bit naïve. The general applicability requirement—no matter how broadly it is interpreted—gives far less of a constitutional right than commentators have assumed. Because a constitutional exemption depends on secular exceptions, which in turn arise only when laws create secular burdens, religious claimants can only receive exemptions from laws when they create substantial secular burdens. As I hope to demonstrate, this fact means that getting an exemption under the new Free Exercise Clause has become a matter of constitutional luck: it depends on random, arbitrary factors, and the protection it provides is sporadic, idiosyncratic, unprincipled, and unpredictable. And in part because it is dependant on irrelevant factors, the general applicability test is completely unresponsive to the strength of the governmental and religious interests at stake.

This article has four parts. Part I introduces the history of the general applicability test. Part II discusses the general applicability test in both theory and practice. In Part III, the unpredictable and unprincipled nature of the general applicability inquiry is examined through the lens of two quite popular cases, *Employment Division v. Smith*[10] and *Fraternal Order of Police v. Newark*.[11] The paper continues its analysis and lays out its conclusions in Part IV.

---

7. 170 F.3d 359 (3d Cir. 1999).
8. 309 F.3d 144 (3d Cir. 2002).
9. 924 F. Supp. 1540 (D. Neb. 1996).
10. 494 U.S. 872 (1990).
11. 170 F.3d 359 (3d Cir. 1999).

I. AN INTRODUCTION TO GENERAL APPLICABILITY

General applicability, as a doctrinal concept in free exercise, is a product of *Smith*, where the Supreme Court first held that laws burdening religious beliefs do not require justification as long as they are neutral and generally applicable.[12] The Supreme Court there rejected a claim by members of the Native American Church that they were constitutionally entitled to ingest peyote as part of their religion's sacrament, as the Oregon statute forbidding peyote use was neutral and generally applicable. Although the *Smith* rule was temporarily displaced by RFRA,[13] *City of Boerne* returned the general applicability test to center stage.[14] Since *Smith* (and other than *Boerne*), only a single free exercise case has reached the Supreme Court to develop how the theoretical concepts of neutrality and general applicability should be interpreted in practice.[15]

In the doctrinal framework created by *Smith*, laws that are neutral and generally applicable require no justification, no matter how seriously they burden the religious claimant, or how trivial the governmental interest is in their execution. Yet there are several exceptions where the compelling-interest test of *Sherbert* is still in full effect.[16] First, there is the "hybrid-rights exception" to *Smith*, which holds that a free exercise claim can be made out when claimants can show a colorable free exercise claim as well as another independent colorable constitutional claim.[17] The hybrid-rights

12. *See Smith*, 494 U.S. at 879. Incidentally, *Smith* was not the first case to use the neutral-and-generally-applicable language. That expression appeared in a concurring opinion by Justice Stevens in *United States v. Lee*, 455 U.S. 252 (1982), but actually seems to have originated from Justice Marshall's dissent in *Trans World Airlines v. Hardison*, 432 U.S. 63 (1977), where the Court held that the Title VII religious accommodation provision did not require employers to make more than de minimis expenditures in accommodating the religious beliefs of their employees. *See Lee*, 455 U.S. at 263 (Stevens, J., concurring); *Hardison*, 432 U.S. at 87 (Marshall, J., dissenting). Justice Marshall appeared to believe that a rule that was not neutral or generally applicable was an instance of outright religious discrimination. He saw the Title VII religious accommodation issue as arising "only when a neutral rule of general applicability conflicts with the religious practices of a particular employee." *Id.*

13. 42 U.S.C. § 2000bb (1994).

14. *See* City of Boerne v. Flores, 521 U.S. 507 (1997).

15. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993).

16. Professor Laycock originally identified seven distinct exceptions to *Smith*, which generally seem collapsible into the categories presented here. *See* Laycock, *supra* note 4, at 41.

17. *See* Employment Div. v. Smith, 494 U.S. 872, 881-82 (1990).

doctrine has been routinely criticized as untenable,[18] and its adoption has often been viewed as the way the *Smith* Court chose to avoid having to overrule previous cases.[19] Some circuit courts, believing it fatally flawed, have ignored it completely.[20] A whole generation of student notes has followed the hybrid-rights exception closely;[21] the consensus seems to be that the doctrine is of little use to religious claimants.[22] Lastly, even its originator, Justice Scalia, seems to have

---

18. The problem is perhaps best addressed by Justice Souter in his *Lukumi* concurrence.

> [T]he distinction *Smith* draws strikes me as ultimately untenable. If a hybrid claim is simply one in which another constitutional right is implicated, then the hybrid exception would probably be so vast as to swallow the *Smith* rule, and, indeed, the hybrid exception would cover the situation exemplified by *Smith* . . . . But if a hybrid claim is one in which a litigant would actually obtain an exemption from a formally neutral, generally applicable law under another constitutional provision, then there would have been no reason for the Court in what *Smith* calls the hybrid cases to have mentioned the Free Exercise Clause at all.

Lukumi, 508 U.S. at 567 (Souter, J., concurring).

19. *See* Joanne C. Brant, *Taking the Supreme Court at Its Word: The Implications for RFRA and Separation of Powers*, 56 MONT. L. REV. 5, 30 (1995) (describing the hybrid-rights exception as "an unartful tool to distinguish troubling precedent"); Kent Greenawalt, *Quo Vadis: The Status and Prospects of "Tests" Under the Religion Clauses*, 1995 SUP. CT. REV. 323, 335 (arguing that "[m]ost scholars assume this language was a make-weight to 'explain' *Yoder* that lacks enduring significance"); Ira C. Lupu, Employment Division v. Smith *and the Decline of Supreme Court-Centrism*, 1993 BYU L. REV. 259, 267 (stating that the hybrid theory may be just "an unprincipled attempt to pretend that *Yoder* survived *Smith*").

20. The Sixth Circuit simply rejected the doctrine out of hand. *See* Kissinger v. Bd. of Trustees, 5 F.3d 177, 180 (6th Cir. 1993) (arguing that the hybrid rights doctrine is "completely illogical" and refusing to apply it until the Supreme Court explains further). The D.C. and First Circuits have interpreted the doctrine as requiring another independently viable constitutional claim—thus eviscerating the doctrine with equal effectiveness in a different fashion. *See* EEOC v. Catholic Univ. of Am., 83 F.3d 455 (D.C. Cir. 1996); Brown v. Hot, Sexy and Safer Prods., Inc., 68 F.3d 525 (1st Cir. 1995).

21. *See generally* William L. Esser IV, Note, *Religious Hybrids in the Lower Courts: Free Exercise Plus or Constitutional Smoke Screen?*, 74 NOTRE DAME L. REV. 211 (1998); Bertrand Fry, Note, *Breeding Constitutional Doctrine: The Provenance and Progeny of the "Hybrid Situation" in Current Free Exercise Jurisprudence*, 71 TEX. L. REV. 833 (1993); Jonathan B. Hensley, Comment, *Approaches to the Hybrid-Rights Doctrine in Free Exercise Cases*, 68 TENN. L. REV. 119 (2000); Timothy J. Santoli, Note, *A Decade After* Employment Division v. Smith: *Examining How Courts are Still Grappling with the Hybrid-Rights Exception to the Free Exercise Clause of the First Amendment*, 34 SUFFOLK U. L. REV. 649 (2001).

22. *See* Esser, *supra* note 21, at 242 (asserting that "[a]nalysis of hybrid claims in the lower courts leads to the unmistakable conclusion that the hybrid 'calculus' or logical interpretation . . . simply is not being applied" and calling the hybrid claim "no more than a smoke screen"); Fry, *supra* note 21, at 863 (stating that "the hybrid situation exception . . . does little to mitigate [the] effect" of *Smith*); Hensley, *supra* note 21, at 132-38 (noting that only two circuits have given the hybrid rights doctrine real substance, and that these courts "have left significant questions unresolved"); Santoli, *supra* note 21, at 672 (arguing that the Court must "define the basis of a hybrid claim" if the doctrine is going to be tenable).

given up on the idea.[23]

Second, religious claimants have state RFRAs, of which there are at least ten,[24] as well as state constitutional provisions that extend the rights of religious claimants beyond the (federal) constitutional floor.[25] The jury is out on the efficacy of these state RFRAs and constitutional provisions, as many states have not adopted such provisions, they cannot modify federal laws,[26] and—even when they are applicable—it is unclear how much of a benefit they can provide religious claimants.[27]

---

23. In Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton, 536 U.S. 150 (2002), the Court held that it violated the free-speech clause for a village to require canvassers from obtaining a permit before going on private property to canvas, solicit, or promote a cause. Justice Scalia concurred in the judgment, but challenged the idea that "one of the causes of the invalidity of Stratton's ordinance is that some people have a religious objection" to it. *See id.* at 171 (Scalia, J., concurring). The author of the hybrid-rights doctrine went on to state, "If a licensing requirement is otherwise lawful, it is in my view not invalidated by the fact that some people will choose, for religious reasons, to forgo speech rather than observe it. That would convert an invalid free exercise claim, *see* Employment Div. v. Smith, 494 U.S 872 (1990), into a valid free-speech claim." *Id.* (Scalia, J., concurring).

24. ARIZ. REV. STAT. ANN. § 41-1493 (Supp. 2002); CONN. GEN. STAT. ANN. § 52-571b (Supp. 2002); FLA. STAT. ANN. § 761.01 (2002); IDAHO CODE § 73-401 (Supp. 2002); 775 ILL. COMP. STAT. ANN. § 35/1 (2001); N.M. STAT. ANN. § 28-22 (Supp. 2000); OKLA. STAT. tit. 51, § 251 (Supp. 2001); R.I. GEN. LAWS § 42-80-1 (1998); S.C. STAT. ANN. § 1-32-10 (Supp. 2002); TEX. CIV. PRAC. & REM. CODE ANN. § 110 (Supp. 2002).

25. *See* Daniel A. Crane, *Beyond RFRA: Free Exercise of Religion Comes of Age in the State Courts*, 10 ST. THOMAS L. REV. 235, 245-46 (1998) (noting that "at least six state supreme courts have . . . reaffirmed the strict scrutiny standard of *Sherbert*" and that "[t]he supreme courts of at least four other States . . . have applied a heightened scrutiny standard under their state free exercise clauses without considering the conflict with *Smith*").

26. The federal RFRA seems to be intact insofar as it is a modification of *federal* law. *See, e.g.*, Guam v. Guerrero, 290 F.3d 1210 (9th Cir. 2001); Kikumura v. Hurley, 242 F.3d 950, 959-60 (10th Cir. 2001); Christians v. Evangelical Free Church, 141 F.3d 854, 859-60 (8th Cir. 1998); EEOC v. Catholic Univ. of Am., 83 F.3d 455, 463 (D.C. Cir. 1996). *But see* United States v. Grant, 117 F.3d 788, 792 n.6 (5th Cir. 1997) (expressing doubt as to the continued constitutionality of RFRA as applied to federal law). Some commentators think RFRA—even as a modification of federal law—is flagrantly unconstitutional. *See, e.g.*, Marci A. Hamilton, *The Religious Freedom Restoration Act Is Unconstitutional, Period*, 1 U. PA. J. CONST. L. 1, 2-3 (1998) (arguing that the federal aspect of RFRA violates separation-of-powers principles and the Establishment Clause). Some think it obviously constitutional. *See, e.g.*, Thomas C. Berg, *The Constitutional Future of Religious Freedom Legislation*, 20 U. ARK. LITTLE ROCK L.J. 715, 727-47 (1998) (noting that Congress should have the power to modify its own laws). And some are in between. *See, e.g.*, Gregory P. Magarian, *How to Apply the Religious Freedom Restoration Act to Federal Law Without Violating the Constitution*, 99 MICH. L. REV. 1903, 1906 (2001) (stressing that "courts have no basis for invalidating [RFRA's] federal law applications; rather, courts should focus on the task of construing Federal RFRA to avoid Establishment Clause problems").

27. *See, e.g.*, Ira C. Lupu, *The Failure of RFRA*, 20 U. ARK. LITTLE ROCK L.J. 575 (1998) (analyzing lower court cases and concluding that the federal RFRA did virtually nothing to protect religious liberty and that analogous state provisions will do similarly

Two other exceptions to the neutral and generally applicable rule arise, but are of little concern here. The *Smith* Court, in altering the constitutional test, said nothing about matters of internal church autonomy. Several circuits have held that *Smith*'s silence should be construed as preserving the compelling-interest test in this narrow category of cases.[28] Another exception from *Smith* may be for unemployment compensation cases, which is how *Smith* distinguished *Sherbert*.[29]

Without minimizing the results of the above four exceptions from the *Smith* rule, it is clear that they all have their limitations. Commentators both for and against tend to agree that the bulk of constitutional protection for religious claimants will come via attacks on laws as being not neutral and generally applicable; there is a tendency in the literature to phrase this as being "the key" to a free exercise claim.[30]

So we then return to the neutral and generally applicable language of *Smith*, which is to govern most free exercise disputes. This concept, which débuted in *Smith*, appeared only briefly there. The court simply stated, "[T]he right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability . . . .'"[31] It was not until a later case, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, that the Court gave

---

little).

28. *See, e.g.*, Combs v. Central Tex. Annual Conference of the United Methodist Church, 173 F.3d 343, 349 (5th Cir. 1999) (arguing that *Smith* applies to free exercise cases based on the religious conduct of individuals, not to "the ability of a church to manage its internal affairs"). *See also* EEOC v. Catholic Univ. of Am., 83 F.3d 455 (D.C. Cir. 1996); EEOC v. Roman Catholic Diocese, 48 F. Supp. 2d 505, 513 (E.D.N.C. 1999).

29. *See* Employment Div. v. Smith, 494 U.S. 872, 883 ("We have never invalidated any governmental action on the basis of the *Sherbert* test except the denial of unemployment compensation.").

30. *See, e.g.*, Richard F. Duncan, *Free Exercise is Dead, Long Live Free Exercise:* Smith, Lukumi *and the General Applicability Requirement*, 3 U. PA. J. CONST. L. 850, 851 (2001) ("Thus, the key to understanding the Constitution's protection of religious liberty in the post-*Smith* world is to locate the boundary line between neutral laws of general applicability and those that fall short of this standard."); Douglas Laycock, *The Supreme Court and Religious Liberty*, 40 CATH. LAW. 25, 26 (2000) ("The key concept in *Smith* is 'neutral and generally applicable law.'"); Ira C. Lupu, *The Case Against Legislative Codification of Religious Liberty*, 21 CARDOZO L. REV. 565, 572 (1999) ("The key to the *Lukumi Babalu Aye* line of cases involves the scope of what constitutes general applicability; laws whose burdens fall upon religion and little else may fall within the *Lukumi Babalu Aye* principle rather than the deferential rule of *Smith*.").

31. *Smith*, 494 U.S. at 879 (citing United States v. Lee, 455 U.S. 252, 263 n.3 (1982)) (Stevens, J., concurring in judgment)). *See also id.* at 878 (stating that laws burdening religious exercise need not have external justification if the burden is "merely the incidental effect of a generally applicable and otherwise valid provision").

more content to the concepts of neutrality and general applicability.[32]

In *Lukumi*, at stake were the rights of a congregation of Santeria practitioners who challenged a set of city ordinances that proscribed animal sacrifice.[33] The Church had begun the process of obtaining the necessary licensing, inspection, and zoning approvals so that the congregation would be able to sacrifice animals, when the city passed ordinances prohibiting the unnecessary killing of animals "in a public or private ritual or ceremony not for the primary purpose of food consumption."[34] Frustrated with the city, the congregation and its congregants filed suit.

The *Lukumi* Court first turned to the requirement of neutrality. Since "the ordinances were enacted "'because of,' not merely 'in spite of,' their suppression of Santeria religious practice," they were deemed to be not neutral.[35] The Court explicitly recognized that this definition of neutrality was being imported from the equal protection context.[36] The Court left its discussion of neutrality at that, but one

32. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993). It seems best to split the test of "neutral and generally applicable" into its two component parts of neutrality and general applicability. The two inquiries overlap to some extent. *See id.* at 557 (Scalia, J., concurring in part and concurring in the judgment) ("The Court analyzes the 'neutrality' and the 'general applicability' of the Hialeah ordinances in separate sections. . . . [b]ut I think it is not necessary, and would frankly acknowledge that the terms are not only 'interrelated,' but substantially overlap."). But courts and commentators seem to analyze the concepts independently, even if there is some theoretical overlap. *See* Carol M. Kaplan, Note, *The Devil is in the Details: Neutral, Generally Applicable Laws and Exceptions from* Smith, 75 N.Y.U. L. REV. 1045, 1075 (2000) (noting that "courts distinguish between the neutrality and general applicability analyses by separating them into two distinct prongs," but believing that it would be "easier to collapse them into a single test").

33. *See Lukumi*, 508 U.S. at 526-27 (1993). There are several case studies on *Lukumi*. *See* Allison J. Cornwell, Note, *Sacrificial Rites Become Constitutional Rights on the Altar of Babalu Aye*, 16 U. ARK. LITTLE ROCK L.J. 623 (1994); Renee Skinner, Note, The Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*: Still Sacrificing Free Exercise*, 46 BAYLOR L. REV. 259 (1994).

34. *See Lukumi*, 508 U.S. at 527.

35. *See Lukumi*, 508 U.S. at 540 (quoting Personnel Administrator v. Feeney, 442 U.S. 256, 279 (1979)).

36. *See id.* at 540 ("In determining if the object of a law is a neutral one under the Free Exercise Clause, we can also find guidance in our equal protection cases."). The Court went on to cite *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977) and *Personnel Administrator v. Feeney*, 442 U.S. 256 (1979) as examples of how courts could determine neutrality by examining things such as "the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body. These objective factors bear on the question of discriminatory object." *Lukumi*, 508 U.S. at 540 (citation omitted).

One must note that this is formal neutrality, not substantive neutrality. Neutrality, like

should note that proving a violation of equal protection is generally perceived as difficult for plaintiffs generally, and there seems to be no reason why the burden would be lessened in the free exercise context.[37]

As a result of the perceived difficulty of proving a lack of neutrality, religious liberty claimants have quickly turned for refuge to the "second requirement of the Free Exercise Clause, the rule that laws burdening religious practice must be of general applicability."[38] The Court in *Lukumi* explained:

> The principle that government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief is essential to the protection of the rights guaranteed by the Free Exercise Clause. The principle underlying the general applicability requirement has parallels in our First Amendment jurisprudence. In this case we need not define with precision the standard used to evaluate whether a prohibition is of general application, for these ordinances fall well below the minimum standard necessary to protect First Amendment rights.
>
> Respondent claims that Ordinances 87-40, 87-52, and 87-71 advance two interests: protecting the public health and preventing cruelty to animals. The ordinances are underinclusive for those ends. They fail to prohibit nonreligious conduct that endangers those interests in a similar or greater degree than [the plaintiffs' conduct does]. The underinclusion is substantial, not inconsequential.[39]

The Court summarized the generally applicable test in disparate-treatment terms: "The Free Exercise Clause 'protect[s] religious observers against unequal treatment.'"[40] Pressing the factual analysis further, the Court noted that "the ordinances are drafted with care to

---

other words in religion-clause jurisprudence, is a word whose very definition is endlessly contested. *See generally* Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Towards Religion*, 39 DEPAUL L. REV. 993 (1990) (discussing possible meanings of neutrality).

37. *See generally* Laycock, *supra* note 4 (arguing that if the Free Exercise Clause is interpreted as simply an anti-discrimination right, then the right of free exercise is essentially nonexistent); *see also* Julia Lamber, Barbara Reskin, & Terry Dworkin, *The Relevance of Statistics to Prove Discrimination: A Typology*, 34 HASTINGS L.J. 553 (1983) (documenting the difficulties of proving discrimination).

38. *See Lukumi*, 508 U.S. at 542.

39. *Id.* at 543 (citations omitted).

40. *Id.* at 542 (quoting Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 148 (1987) (Stevens, J., concurring)); *see also* Laycock, *supra* note 30, at 28 ("*Lukumi* . . . is a case about objectively unequal treatment.").

forbid few killings but those occasioned by religious sacrifice."[41] There were exceptions for fishing, exterminating mice and rats within a home, euthanizing stray animals, and destroying animals removed from their owners for humanitarian reasons.[42] What Florida could not do, the Court stressed, was simply deem religious sacrifice of lesser importance than secular sacrifices that threaten the same harm. "These *ipse dixits* do not explain why religion alone must bear the burden of the ordinances, when many of these secular killings fall within the city's interest in preventing the cruel treatment of animals."[43] Since exempting the religious believers did not pose any more harm to the city's interest than the existing exemptions for secular activities, the Court granted the religious believers an exemption.

Finally, the Court created one final nuance to the "general applicability" inquiry. The *Smith* Court noted that "where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason."[44] This language could be viewed as creating a third requirement independent of both the neutrality and general applicability inquires. Courts and commentators, however, have tended to view the "individualized exemptions" part of *Smith* to be read as an aspect of the generally applicable inquiry.[45]

II. THE GENERAL APPLICABILITY REQUIREMENT IN THEORY AND PRACTICE

This, essentially, is all the Supreme Court has had to say about the theory of the general applicability requirement. The gaps have been

41. *Lukumi*, 508 U.S. at 543.

42. *See id.* at 543-44.

43. *Id.* at 544.

44. Employment Div. v. Smith, 494 U.S. 872, 884 (1990) (citing Bowen v. Roy, 476 U.S. 693 (1986)).

45. *See* Duncan, *supra* note 29, at 861 ("Although some commentators view the individualized exemption process rule as [being a separate requirement] . . . the rule is best understood as nothing more than a subset of the general applicability requirement."); *see also* Kaplan, *supra* note 32, at 1062 (noting that "courts conflate the 'generally applicable' inquiry with the 'individualized exemptions' analysis, reasoning that where a law contains a system of individualized exemptions it cannot be generally applicable"). Some courts, however, do view the "individualized exemption" requirement as being a hidden third component of the "neutral and generally applicable" test. *See* Swanson v. Guthrie Indep. Sch. Dist., 135 F.3d 694 (10th Cir. 1998) (employing a three-part analysis that considers neutrality, general applicability, and standardized exemptions as independent criteria); Kissinger v. Board of Trustees, 5 F.3d 177 (6th Cir. 1993) (same).

left to lower courts and academic commentators to fill. Before looking at the implementation of the general applicability requirement, it helps to have an understanding of what, in theory, it aims to accomplish.

A. The Theoretical Underpinnings of General Applicability

Based on what the Court said in *Smith* and *Lukumi*, commentators have viewed the theory of the generally applicable inquiry as being something like this: as long as a law remains exceptionless, then it is considered generally applicable, and religious claimants cannot claim a right to be exempt from it. When a law has secular exceptions, however, a challenge by a religious claimant becomes possible. In this sense, the general applicability requirement gives religious groups a sort of disparate-treatment right. The test essentially forces religious interests to be treated on par with secular interests—when secular interests have been given an exception, religious interests must be given an exception as well.

To put it differently, the general applicability requirement requires that a legislature "not place a higher value on some well-connected secular interest group with no particular constitutional claim than it places on the free exercise of religion."[46] When a secular interest is preferred over the free exercise of religion, the religious observer must be granted an exception. This requirement, commentators posit, serves as a way to achieve a rough equality for religious groups in a secular world.[47] The need for such an equality right comes from the perceived difficulty that religious groups (who are often minorities) can have in obtaining exceptions in the legislative sphere.[48] The general applicably requirement, however, allows religious groups to "piggyback" on the battles fought for secular interests in the political branches. Whenever a secular group gets an exception, they have automatically and unwittingly provided religious claimants with the basis for a possible religious exception. As a result, religious groups

46. *See* Laycock, *supra* note 30, at 35.

47. *See* Duncan, *supra* note 30, at 881 ("This is an equality rule not a liberty rule, because religious exercise is protected, not as an end in itself, but only to the extent that analogous secular conduct is protected."); Lawrence G. Sager, *Panel One Commentary*, 57 ANN. SURV. AM. L. 9, 12 (2000) (arguing that "*Smith*'s demand for neutral rules of general applicability is best understood as responding to [a tacit commitment to equal regard]").

48. *See* Laycock, *supra* note 4, at 57 ("Legislative exemptions are often hard to get, and they often require a political battle.").

receive vicarious protection through the legislative process.[49] A legislature can choose to make a law exceptionless. But once it begins to make exceptions, it must let a religious claimant out of the regulatory structure at the same time it lets a secular interest group out. Religious groups are further helped by the very nature of the legislative process, which is conducive to the creation of secular exceptions.[50] The nature of legislation often turns on compromise; legislators make exceptions for groups in order to win over opposition. The general applicability requirement, at its best, inverts the political process to protect the very groups it is prone to ignore.

In a sense, then, the general applicability test gives a sort of disparate treatment right to religious groups. When secular interest groups are given an exception, religious groups are also provided with one. This is very similar to the disparate-treatment right given to minority groups under the Equal Protection Clause or Title VII. In fact, there is a strong analogy between the work of a post-*Smith* free exercise lawyer and that of a traditional race employment-discrimination lawyer. Both look for evidence of unequal treatment. The religious-liberty lawyer searches through legislative history and related legislation to find some example of a secular interest being treated better than a religious one. Similarly, an employment-discrimination lawyer searches through an employer's files looking for instances where employees of one race are treated better than those of another. To give an example, perhaps an employer has refused to hire an African-American employee and the employee's lawyer strongly suspects racial discrimination. The employment-discrimination lawyer then looks for examples where employees of other ethnicities were hired despite having lesser credentials. Similarly, the free exercise lawyer looks for statutory examples where other interest groups receive exceptions despite the fact that their exceptions do as much (or more) harm to the rule as a religious claim for exception would. The similarity between these two situations shows why it is useful to consider the general applicability inquiry as giving a kind of disparate-treatment right. This type of right is

49. *See* Laycock, *supra* note 30, at 35 (noting that "if burdensome laws must be applied to everyone, religious minorities will get substantial protection from the political process").

50. *Id.* at 35 ("[R]eligious claimants can often prevail, because the way the American legislative process works is to cut special deals and make exceptions for squeaky wheels. If you let out the interest group that complains the most, you have to let out the religious claimant as well.").

stronger in the religious context than in the racial context. In the racial context, the only possible comparison to the employee is a similarly situated worker of a different race. In the free exercise context, however, a religious claimant may be able to analogize his claims to a variety of secular activities. As a result, the general applicability requirement gives a more powerful sort of disparate-treatment right than is usually seen in the racial context.

B. The Application of the General Applicability Requirement

Despite this conceptual simplicity, the general applicability requirement offers some difficulties in implementation. Precisely because the general applicability requirement allows a religious claimant to analogize his claims to a variety of secular activities, the disparate-treatment analysis is not self executing. One is faced with an initial question that does not appear in the racial context: Is the exempted secular activity really analogous to the religious claimant's activity? The literature is dominated by the incarnations of this question; it usually takes the form of a commentator pondering how numerous and severe the secular exceptions have to be before the law is considered not generally applicable. This question is one that has dominated the free exercise literature. Without going into all its details—a point of this paper is that this question is not as important as it seems—a little background is necessary.

First, it should be noted that many commentators have argued, often forcefully, that the general applicability inquiry should be interpreted as simply being a prohibition on intentional discrimination. Professor Tushnet, for example, has argued that this is the most plausible way of interpreting the Supreme Court's decisions in *Smith* and *Lukumi*.[51] Others vigorously contest this interpretation.[52]

---

51. To Professor Tushnet, the natural reading of these cases is that the Free Exercise Clause now "protects only against statutes that target religious practice," and that "those who offer these alternative case readings do so because they disagree with the cases' natural reading and believe that the Free Exercise Clause ought to give religious liberty more protection than the Supreme Court appears to believe it should." Mark Tushnet, *The Redundant Free Exercise Clause?*, 33 LOY. U. CHI. L.J. 71, 72 & 71 n.3 (2001); *see also* Lupu, *supra* note 27, at 599 ("*Lukumi* holds actionable under the First Amendment religious gerrymanders, laws which, upon close inspection, are designed intentionally to disadvantage religion."). Some have found such a motive attractive on normative grounds. *See* Wendy K. Olin, Note, *Constitutional Survival Camp: What Are the Chances That the General Applicability Test Will Make It?*, 68 S. CAL. L. REV. 1029 (1995) (arguing that the generally applicable test should devolve into solely an inquiry about legislative motive).

52. *See* Laycock, *supra* note 30, at 28 ("Whatever else it may be, *Lukumi* is not a

The government—the defendant in all free exercise claims—makes a similar argument. It often argues that the general applicability inquiry is tautologically satisfied, because a law is always generally applicable to the objects to which it applies.[53] The Court, however, has rejected this view, stating that the rule must be generally applicable with respect to the ends of the legislation—that is, the Court held that the general applicability requirement was really about underinclusiveness.[54]

On the other side, some commentators have intimated that virtually any secular exception should create a claim for religious exception, arguing that the Free Exercise Clause demands that religious interests be treated as well as the most favored secular interests.[55] Professor Volokh has pointed out, however, that this ideal is simply impossible to implement in reality, as virtually all laws have some secular exceptions.[56] "Even the bans on intentional homicide have exceptions—execution of a lawful sentence, killing in war, police killing of a dangerous fleeing felon, killing in self-defense or in defense of another, and disconnecting life-sustaining equipment at a patient's request."[57]

Most commentators have chosen a position between these extremes, arguing that the presence of secular exceptions is necessary, but not sufficient, to justify a religious claim for exception. These commentators have generally come to the conclusion that the question is really whether the secular exceptions endanger the purposes of the legislation to a similar or greater degree than a religious exemption

---

motive case. The lead opinion explicitly relies on the city's motive to exclude a particular religious group—and that part of the opinion has only two votes. So whatever the holding is, it is not a holding about motive.").

53. *See* Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 344-46 (1949) (noting that the requirement of equality can be regarded as paradoxical in that laws are always equal in applying to all objects to whom they apply, and unequal in that they distinguish objects of regulation from those that are unregulated); Laycock, *supra* note 30, at 31 (calling this argument "entirely circular").

54. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 542 (1993) (noting that the ordinances in question are "underinclusive for [their] ends," and that they are constitutionally infirm because "[t]hey fail to prohibit nonreligious conduct that endangers these interests in a similar or greater degree than Santeria sacrifice does").

55. *See, e.g.*, Laycock, *supra* note 4, at 49-50 (arguing that religious interests should receive this sort of "favored nation status").

56. *See* Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. REV. 1465, 1540 (1999) ("But virtually all laws, including those widely seen as aiming at quite serious harms, contain many secular exceptions."); *cf.* Laycock, *supra* note 4, at 50 ("American statutes are riddled with exceptions and exemptions for various special interests, small businesses, private citizens, and government agencies.").

57. Volokh, *supra* note 56, at 1540.

would,[58] although they vary in the degree of underinclusiveness they believe is required before a court may strike down a particular law.[59] Using this general consensus as a starting point, we can use a useful example by Professor Volokh—with a response by Professor Duncan—that can serve to conclude this section by frankly demonstrating the difficulties in the actual application of this test.

Let us examine a hypothetical question involving a person who claims an exemption from trespass law to view an apparition of the Virgin Mary (or other sacred object) on private land.[60] One is to assume that trespass law has exceptions for adverse possession, necessity, and law enforcement.[61] Volokh wants to use this example

58. *See id.* at 1542. This formulation of the inquiry is my own. Commentators have adopted various different formulas that seem approximately equivalent. *See* Duncan, *supra* note 30, at 868 ("In order to determine if a law restricting religious exercise is underinclusive, one must ask two questions. First, what governmental purposes are being served by the restrictive law at issue? Second, does the law exempt or otherwise leave unrestricted secular conduct that endangers those governmental purposes in a similar or greater degree than the prohibited or restricted conduct of the party seeking the protection of the Free Exercise Clause?"); Kaplan, *supra* note 32, at 1078-79 (turning these questions into a two-part inquiry); Kenneth D. Sansom, Note, *Sharing the Burden: Exploring the Space Between Uniform and Specific Applicability in Current Free Exercise Jurisprudence*, 77 TEX. L. REV. 750, 767-70 (1999) (turning these questions into a different two-part inquiry).

59. The *Lukumi* Court said the underinclusion had to be "substantial," and "not inconsequential." *See Lukumi*, 505 U.S. at 543. Other commentators have formulated this requirement in various ways. *See, e.g.*, Duncan, *supra* note 30, at 876 (requiring "substantial" underinclusion in a statute before constitutional infirmity); Sansom, *supra* note 58, at 769 (arguing that there must be "inconsistent" underinclusion before a constitutional claim is viable); Frederick Mark Gedicks, *The Normalized Free Exercise Clause: Three Abnormalities*, 75 IND. L.J. 77, 114 (2000) (requiring the law to be "so dramatically underinclusive that religious conduct is virtually the only conduct to which the law applies").

60. Incidentally, though few would believe it, these trespass cases actually do arise. In *United States v. Acevedo-Delgado*, 167 F. Supp. 2d 477 (D.Puerto Rico 2001), a minister was arrested for entering a military reservation in Vieques without permission. He raised a free exercise claim in his defense. It should be relatively unsurprising that the district court took no notice of the discussions of this hypothetical in the law reviews. Instead, the district court tersely denied the exception, holding that the "federal trespass statute at issue . . . generally applies to all members of the public." *Id.* at 480 (citation omitted). This case differs a little from the case of private trespass discussed above. In the case of private property, there may be a stronger argument for preventing trespass, because the cost of the trespass is placed on a single landowner rather than the public at large. The question of whether the government should have the same (relatively absolute) right to exclude trespassers as private landowners do—or whether the government must show that the trespass would interfere with the government's use of the property—is a question that the Supreme Court has had to address repeatedly in the context of the Free Speech Clause. *See, e.g.*, Int'l Soc. for Krishna Consciousness v. Lee, 505 U.S. 672 (1992) (suggesting that the government should be vested with the same rights as any other property owner); Grayned v. City of Rockford, 408 U.S. 104 (1972) (suggesting that the government must show incompatible use).

61. Duncan, *supra* note 30, at 875 (quoting Eugene Volokh, *Intermediate Questions of*

to demonstrate the indeterminacy of the general applicability test; he wants to show how even intuitively easy cases become impossibly difficult under its rubric. The answer, everyone concludes, is that the religious observer here must be denied an exception. Yet, the fact that there are exceptions to the no-trespass rule seems to suggest that an exception must be given to the religious trespasser. Volokh's point is that while everyone agrees on how this claim must be decided, the general applicability inquiry does not give us a way to cleanly reach the proper result. General applicability, to Volokh, is a concept that cannot naturally reach a result that is obviously necessary, which makes it a concept that is manipulated with ease and has little real usefulness.

Professor Duncan, who believes that the general applicability test is a workable approach to free exercise, seeks to defend the feasibility of general applicability. He seeks to demonstrate that the general applicability test does easily (and correctly) resolve Volokh's hypothetical. Duncan believes that an exception should be denied here because the "degree of underinclusion does not appear to be substantial."[62] He argues that the law enforcement and necessity exceptions are "extraordinary and inconsequential exceptions to the general primacy of the sanctity of private property."[63] The doctrine of adverse possession, he argues, is "not an exception to the law of trespass" at all, but rather a form of the statute of limitations.[64] As a result, none of the secular exceptions undermine the rule to the same extent that the religious exemption would, and so the religious claimant should lose. Duncan effectively concludes that this is a "workable test for general applicability when applied to the law of trespass."[65]

While this analysis seems solid at first glance and the result is certainly consistent with our intuitions, Duncan's analysis does raise some nagging questions. Why are the exceptions for law enforcement and necessity "extraordinary" and "inconsequential"? And if they are—does that discount, or does it bolster, a religious liberty claim? If the government can accommodate the needs of law enforcement without denigration of the entire property-rights regime, and can even

---

Religious Exemptions—A Research Agenda with Test Suites, 21 CARDOZO L. REV. 595, 632 (1999)).

62. Duncan, *supra* note 30, at 876.

63. *Id.*

64. *Id.*

65. *Id.*

make a secular exception for the obviously vague category of "necessity," there seems an intelligible argument for a religious exemption.

And why is the exception for adverse possession not to be considered an exception? Duncan claims the exception for adverse possession is really part of another rule—a separate rule, which deals with when one's property rights are transferred to another. How are we to know, in any particular case, what the rule is and what the exceptions are? A clever government lawyer will always be able to argue that clear exceptions are actually different rules, and a similarly clever free exercise lawyer will be able to argue that different rules are actually clear exceptions. There is no getting away from the fact that there is deep uncertainty in trying to discern what the "rule" is and what the "exceptions" to that rule are.[66]

On the other hand, this does seem to be a genuinely easy case. To put away the abstractions for a moment, it seems that granting a religious exception would do significantly more harm to the rule than the existing secular exceptions, regardless of whether adverse possession is considered one of them. The necessity, law enforcement, and adverse possession exceptions produce highly context-dependant and individual-specific exceptions to the trespass statute. None of them produces a continuing flow of people onto a particular property. An exception for the religious claimant, however, would drive a truck through this narrow hole—producing a right not limited to a particular time, place, or individual. The resolution of many cases will be very difficult,[67] but some of them will remain

66. Frederick Schauer, *Exceptions*, 58 U. CHI. L. REV. 871, 874-75 (1991) ("[T]he necessity of an exception (or lack thereof) to some legal rule is largely a function of the array of linguistic tools then available to the drafter of the rule. Where the language in which the rule is written contains a word or a familiar phrase that itself excludes what the drafters wish to exclude from the scope of the rule, no exception is necessary . . . . But where language does not provide any word or phrase, the scope of some primary prescription of proscription will be defined in terms that are likely to be overinclusive, from the perspective of the goals of the legal rule."); *see also* Volokh, *supra* note 56, at 1541 ("As Fred Schauer has pointed out, what looks like the exception and what looks like the rule often turns on largely irrelevant factors, such as whether existing legal language happens to contain a single phrase to describe some morally significant concept.").

67. Another hypothetical that exposes the difficulty between ascertaining the rule and the exceptions to that rule is a religious minority's claim for an exception to celebrate a little-known religious holiday. Do the pre-existing religious holidays already on the calendar, such as Easter and Christmas, constitute exceptions to the rule—or is the "rule" the Christian calendar? Depending on your conceptualization of the "rule" and the "exceptions," the question of whether the religious claimant receives an exemption may have different answers. *See* Laycock, *supra* note 4, at 51. For those whose instincts

quite easy.

III. THE GENERAL APPLICABILITY INQUIRY AND CONSTITUTIONAL LUCK

The current fight in free exercise discourse, as we have seen, is the fight over the breadth of the general applicability criterion. How significant do the exceptions have to be before the rule fails to be generally applicable? This fight has dominated the discussion of the general applicability test in both the academic literature, as evidenced in the debates between Duncan and Volokh, and also in the actual litigation that goes on between free exercise litigants and the government.

But the ongoing debate, I contend, has overlooked a critical point. In order for a religious claimant to get an exception, the rule must have existing secular exceptions. But in order for those secular exceptions to arise, the law must create some secular burdens. The religious believer must rely not only on secular interests to unwittingly help him out by grafting an exception, but also on the underlying law to create a distribution of secular burdens that is likely to produce secular exceptions. To the extent that no secular burdens arise and no secular exceptions develop, the religious claimant cannot win. This is pure common sense: when a law creates secular, as well as religious, burdens—the religious can rely on the secular interest group to fight for exceptions. When the law creates no secular burdens, religious groups are on their own.

As a result, a constitutional claim for exemption from a particular law will often critically depend upon whether the law creates secular burdens. A burden that falls selectively on religious claimants will be immune from constitutional attack. As I hope to illustrate in the following examples, this constitutional setup is a strange animal. Essentially, what is required for a religious claimant to win a free

---

suggest that the religious minority should receive an exception to celebrate their holiday, consider again the Supreme Court's decision in *Smith*. *Smith* involved two Native American Church members who claimed a religious exemption to Oregon's controlled substance laws. The court found that the Oregon statutes in question were generally applicable because peyote use was always prohibited. If the statutes in question were reconceptualized as creating a general restriction against drug use in general, then might the exceptions for alcohol, tobacco, and other drugs (in some circumstances) make the restriction on peyote not generally applicable? *See* Larry Alexander, *Are* Smith *and* Hialeah *Reconcilable?*, 13 CONST. COMMENTARY 285, 287 (1996) ("[N]ote that the law in *Smith*, the paradigm case of a law of general applicability, can be looked at as making an exception for one secular value but not for a religious value. For example, why was peyote banned but not alcohol . . . ?").

exercise case is a kind of constitutional luck. The discussion will follow, but first I present some examples that best demonstrate my point.

A. More Test Suites

1. *Fraternal Order of Police v. City of Newark*

Fraternal Order of Police v. City of Newark[68] serves as an excellent illustration of how the presence or absence of secular exceptions governs the general applicability inquiry, thus making free exercise exemptions unpredictable and unprincipled.

In *Newark*, two Islamic police officers challenged internal regulations of the Newark Police Department as infringing their free exercise rights. Since 1971, the Newark Police Department had maintained an internal order (Order 71-15) requiring male officers to shave their beards. These two Islamic officers, however, refused to shave their beards, arguing that they were religiously obligated to wear a beard. They pointed out that several sections of the Qur'an required Muslim men who could grow a beard to do so. The two officers, Faruq Abdul-Aziz and Shakoor Mustafa, were questioned about their noncompliance, and told that refusing to shave might warrant removal from the department. Aziz and Mustafa then sued, claming that the internal police department order violated their free exercise rights. The plaintiffs argued several legal theories in the trial court,and succeeded in both the trial and appellate courts on the claim that the law was not generally applicable.[69]

The rule had two secular exceptions; the Department allowed beards for those officers who needed them for medical reasons and for those who needed them for undercover operations. The undercover exception was necessary, the Department argued, for the protection of its officers. The medical exception was necessary to fulfill the Department's commitments under the Americans With Disabilities Act (ADA), which requires that the Department make

68. 170 F.3d 359 (3d Cir. 1999). For a factual and constitutional overview of *Newark*, see Merric J. Polloway, Case Note, *Free Exercise Forbids Police Departments to Discipline Officers Who Wear Beards for Religious Reasons When Other Secular Reasons for Wearing Beards Already Merit Exemptive Status*, 30 SETON HALL L. REV. 397 (1999).

69. The plaintiffs also argued both that *Smith* applied only in cases involving criminal prohibitions and also that, under *Smith*, they would have a valid hybrid-rights claim. The *Newark* court rejected the former theory and did not reach the latter. *See Newark*, 170 F.3d at 363-64.

"reasonable accommodations" for its disabled employees.[70] These exceptions were considered to be necessary infringements on the Department's "no shaving" policy, which in general tried to encourage a uniform appearance, which would enable officers and citizens alike to identify officers and build morale and esprit de corps.

The Third Circuit began by noting that the undercover exception did not detract from the general applicability of the rule.[71] Instead, it was the secular medical exception that made the rule constitutionally infirm. The medical exception, the court held, was similar enough to the kind of claim a religious claimant would bring to mandate a religious exception. The city then, as part of the general applicability inquiry, had to explain why "religious exemptions [would] threaten important city interests but medical exemptions [would] not."[72] Since the city did not meet this burden, the court held that the Department's policy would have to be evaluated under strict scrutiny, ultimately holding that it failed to meet this high bar.

Newark has received more than its share of pages in the law reviews. It has been heralded as a great win for religious liberty. Commentators have generally focused on a few aspects of *Newark*, all concerning the underlying issue of whether or not the rule was *really* generally applicable:[73] Did the medical exception truly necessitate a religious exception? Does this religious claim for exception threaten to create a flood of exceptions, making this particular claim more of a threat to the "no-shaving" rule than a medical exception? Was the court correct in holding that the undercover exception did not undermine the rule? As one can see, all of these questions have at their heart the issue explored earlier—what sorts of (and how many) secular exceptions must there be in order to render the rule not generally applicable?

My focus is elsewhere. Let us examine the factual scenario of *Newark* more closely to find out how these secular exceptions actually developed. The relevant secular exception—the one that

---

70. *See* 42 U.S.C. § 12112(b)(5)(A) (1994).

71. *Newark*, 170 F.3d at 366 (noting that the undercover exception did "not undermine the Department's interest in uniformity because undercover officers obviously are not held out to the public as law enforcement person[nel]") (alteration in orginal) (internal quotation omitted).

72. *Id.* at 367.

73. *See, e.g.*, Thomas Berg, *Religious Liberty in America at the End of the Century*, 16 J.L. & REL. 187, 193-96 (2001); Duncan, *supra* note 30, at 872-880; Laycock, *supra* note 29, at 22-23.

resulted in a religious exception for our claimants—was the internal regulation that allowed officers to be exempt from the no-shaving requirement if they obtained "medical clearance," that is, they showed some medical reason why they could not wear a beard. Now obviously, this secular medical exception did not simply spontaneously arise. The Third Circuit notes, very briefly and parenthetically, that the root of the medical exception was a skin condition called pseudo folliculitis barbae.[74]

The Third Circuit leaves its discussion of pseudo folliculitis barbae at that, and no commentators to my knowledge have examined it either. Briefly, pseudo folliculitis barbae, otherwise known as PFB, is a common medical condition among African and Arab-Americans because of their extremely curly facial hair. Shaving generally causes the ends of hairs to sharpen; they become, in effect, miniature spears. For individuals with extremely curly hair, the hairs can curve back into the skin, causing inflammation and severe discomfort. PFB occurs only in African and Arab-American populations where its incidence reaches only fifteen percent—Caucasians cannot develop it. But while most people have not even heard of this skin condition, it obviously does affect daily life for those who are affected by it.[75] The best treatment for PFB is to simply let the beard grow, for when hairs get beyond a certain length they cannot curl back into the skin.

The medical cause of PFB and its relative incidence in various ethnic populations may seem irrelevant at first glance, but my point is that the viability of the constitutional claim in *Newark* hinges on the existence and prevalence of this skin condition. It is the existence of PFB, its prevalence, and its incurability, that make the claim in *Newark* possible because they are what created a medical exception to the rule.

We see then how precarious the plaintiff's claim in *Newark* actually was. If there were effective treatments for PFB (other than shaving), then the plaintiffs would have lost. If the plaintiffs had lived

74. *See id.* at 360 (noting that "exemptions are made for medical reasons (typically because of a skin condition called pseudo folliculitis barbae), but the Department refuses to make exemptions for officers whose religious beliefs prohibit them from shaving their beards").

75. For information on PFB, there are some diverse sites. *See generally* THE MERCK MANUAL OF DIAGNOSIS AND THERAPY ch. 116 (2001), *available at* http://www.merck.com/pubs/mmanual/section10/chapter116/116f.htm (last checked February 4, 2002); Cheryl Guttman, *Laser Targets PFB*, DERMATOLOGY TIMES, Jan. 1, 2002, *available at* http://www.dermatologytimes.com/dermatologytimes/article/articleDetail.jsp?id=6945 (last checked February 15, 2003).

in a jurisdiction with few African-Americans, the plaintiffs would have lost. If the plaintiffs had lived in a jurisdiction where African-Americans are unlikely to be afflicted with PFB—warm weather, some claim, lessens the intensity of PFB—the plaintiffs would have lost. If the ADA had not been passed, or if it had been interpreted by the police department as not requiring that the department exempt sufferers of PFB from having to shave, the plaintiffs would have lost. If there were simply no such thing as PFB—if the skin condition simply did not exist—then the plaintiffs would have lost. The plaintiffs in *Newark* were dependant on all of these factors, any one of which would have prevented the plaintiff's claim.

So where is the great triumph for religious liberty? *Newark* has been celebrated among academics as giving real substance to the general applicability inquiry and thus to free exercise.[76] But the Islamic police officers here are permitted to exercise their religion only because of the underlying rate of incidence of an African-American skin condition. What great principle of religious liberty determined this case? The plaintiffs' victory here was a fluke.

In demographically different communities, with different proportions of African-Americans and different climates, the proportion of those afflicted with PFB might be such that there is no secular medical exception to "no shaving" policies. In such a community, plaintiffs under the exact same facts will lose.[77] And the factors bearing on whether a secular exception exists will not only vary from place to place, but also from time to time. The plaintiffs in *Newark* face a considerable problem in that, if they ever have to return to court they may well lose. This is because the medical

76. Commentators have been extremely optimistic about the *Newark* decision. *See, e.g.*, Christopher L. Eisgruber and Lawrence G. Sager, *Congressional Power and Religious Liberty After* City of Boerne v. Flores, 1997 SUP. CT. REV. 79, 129 (citing *Newark* as an example of how "after *Smith* and *Flores*, religious minorities and religious practice continue to receive the kind of special judicial solicitude which the *Carolene Products* doctrine recommends"); Duncan, *supra* note 30, at 883 (arguing that, in fact, "[t]he Free Exercise Clause has evolved into a leaner, meaner religious-liberty-protecting machine in the wake of the Supreme Court's recent decisions in *Smith* and *Lukumi*"); Thomas C. Berg, *The New Attacks on Religious Freedom Legislation, and Why They Are Wrong*, 21 CARDOZO L. REV. 415, 417 (1999) (noting *Newark* as an example that "demonstrated the potential" of the general applicability test in "protecting religion from thoughtless, unnecessary governmental burdens"); Laycock, *supra* note 30, at 35 (stating that if other courts followed *Newark*, "religious claimants can often prevail").

77. Obviously the facts are different; one plaintiff would have a constitutional exemption and the other would not. The point I wish to make is that the facts that determine whether or not an exemption is given are ones that we all can agree should be irrelevant. *See infra* section III(B)(1).

research on PFB is advancing; several potential cures for PFB are in testing phases.[78] These cures would obviate the need for a secular medical exception, which would, in the same breath, eviscerate the claim for a religious exception. Plaintiffs like those in *Newark* must hope that the advance of medical science does not preempt their constitutional right to follow the teachings of the Qur'an.

The general applicability inquiry makes every free exercise claim a matter of luck. Each religious claimant must rely on some secular exception, but in order for a secular exception to arise, the law must burden some secular interest group. The existence of a secular burden depends on many factors, many of which seem like they should be irrelevant to constitutional law. Plaintiffs depend on a fortuitous conjoining of these random factors for their constitutional right. If the stars do not align just right, then the plaintiff's constitutional right evaporates.[79]

2. *Employment Division v. Smith*

And while some plaintiffs (like those in *Newark*) will get constitutionally lucky, other plaintiffs will see their constitutional luck run out. In *Newark*, we saw that the religious claim for exemption depended on the secular burdens created by the law, and all the seemingly irrelevant factors that weighed into that determination. Similarly, in cases where plaintiffs lose, their constitutional claim fails principally because seemingly irrelevant factors conspire to prevent a secular burden from ever arising.

The case that generated the neutral and generally applicable test, *Smith*, helps illustrate the point. In *Smith*, two members of the Native American Church sought unemployment compensation after being fired by a private drug rehabilitation organization for ingesting peyote. Their applications for unemployment were denied because of a state statute preventing distribution of unemployment compensation

78. *See* Guttman, *supra* note 75, at 46 (reporting scientific studies documenting how the long-pulsed YAG laser is an effective option for treating pseudofollicultis barbae); Miriam E. Tucker, *Eflornithine Cream Helps Eliminate 'Razor Bumps' in Black Men*, FAMILY PRACTICE NEWS, Oct. 15, 2001, at 9 (reporting epidemiological studies indicating how a topical cream reduces the incidence of PFB).

79. I am tempted to make a remark about how freedom of religion now depends on an alignment of stars when it used to be one of the few fixed stars in the constitutional constellation. *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (Jackson, J., for the Court).

to those discharged for work-related misconduct.[80] Smith and Black then sued, claiming a violation of their constitutional rights. Because the complainants could not show that the neutral and generally applicable standard was violated, the Supreme Court denied their claim.[81] The Court in *Smith* implicitly held that there were no relevant secular exceptions to the Oregon statutes prohibiting peyote use. This scenario therefore is the easiest possible one to analyze under the neutral and generally applicable standard, and the result is apparently uncontroversial.

Let us examine *Smith* and the reasons why the claimants lost in the same way that we analyzed why the claimants won in *Newark*. In *Newark*, the regulation mandating that officers be clean-shaven had a medical exception, which existed only because of the prevalence of a skin condition that made it impossible for many African-American officers to comply with the regulation. We noted above that the religious claimant had this skin condition to thank for the success of his religious liberty claim. Fortunately for the religious claimant, the police regulation created a substantial secular burden, which gave rise to the religious exemption. Without that secular burden, the claimants in *Newark* would have lost.

The question then becomes, why did the law forbidding peyote use not create any secular burdens? To answer that question, one has to contemplate what sorts of secular burdens arise from restrictions on drug use. Certainly, those who want to use the drug recreationally are burdened. But that constituency certainly was not strong enough in *Smith*; there simply was not a significant push for recreational peyote use in Oregon.[82]

---

80. *Smith*, 494 U.S. at 874-75.

81. *See id.* at 879. Eventually, the Native American Church did receive an exemption for peyote use. In 1994, the federal government amended the American Indian Religious Freedom Act to protect religious peyote use by Native Americans in all states. *See* American Indian Religious Freedom Act Amendments of 1994, Pub. L. No. 103-344, 108 Stat. 3125, (*codified at* 42 U.S.C. § 1996a (2000)). This exemption may be an excellent indication of how legislatures are responsive to the needs of religious minorities. On the other hand, it may simply be an example of how religious minorities need to lose in the Supreme Court before anyone listens to them.

82. This actually was one of the crucial points that the plaintiffs tried to make in their case. They believed that the lack of a recreational peyote scene in Oregon was a sign that the government did not have a compelling interest in denying their religious claim for peyote use. Instead, however, that fact worked against the plaintiffs because no secular exception ever developed in the law. Of course, a secular exception of that magnitude would render the whole legislative scheme unworkable and hence would be extremely unlikely to develop.

The other principal reason for the lack of secular burdens created by an absolute prohibition on peyote use is that peyote happens to be a relatively useless drug outside of Native American Church rituals. Peyote, a hallucinogen derived from the plant lophophora williamsii lemaire, is considered by the Drug Enforcement Agency to be a "drug[] of abuse" that has "no known medical value."[83] Because peyote is a useless drug for medical purposes, Oregon's complete prohibition on it likely raised no qualms in the secular community.

Just as the constitutional win in *Newark* was based on some factors that seemed irrelevant, the loss in *Smith* was based on equally immaterial factors. If peyote had some strong medicinal value there might well have been a sizeable medical exception in the statute, and so the plaintiffs may have won. The plaintiffs may also have won if they had sought to use some other drug, like Prozac perhaps, that had medical value and was frequently used,[84] for the statutes regulating these types of drugs are littered with exceptions, most notably for routine medical treatment.[85]

One must also note that secular burdens can change over time. In *Newark*, we saw that if treatments for PFB were developed, the Islamic officers' constitutional claim might dissipate. Just as a win might become a loss, so a loss may become a win. Modern research on peyote suggests that it may yet have some medical value. Researchers at Harvard Medical School have for years been studying peyote, as it may be of use in curing everything from long-term memory problems to schizophrenia to depression.[86] If some medical

---

83. Sandra Blakeslee, *Scientists Test Hallucinogens for Mental Ills*, N.Y. TIMES, March 13, 2001, at F1.

84. Use of such antidepressants is continually on the rise. *See* Carl T. Hall, *Depression Treatment Rates Increasing; Threefold Rise Seen Since 1987 in Study*, S. F. CHRON., Jan. 9, 2002, at A1 (reporting that over six million people were using Prozac in outpatient therapy in 1997); Leonard H. Glantz, *Research With Children*, 24 AM. J.L. & MED. 213, 218 n.55 (1998) (noting that Prozac was prescribed nearly 350,000 times in a year for treatment of depression and obsessive compulsive disorder in children under sixteen). Catharine Cookson points out that the drug the Native American Church chose, peyote, is far safer than drugs like Librium, which is on the market to treat anxiety and depression. She concludes, "Treating anxiety and depression is useful, and thus to society the drug is worth the substantial risks. The worship of God apparently is not as useful, and thus it is not worth even the most minimal risks." CATHARINE COOKSON, THE COURTS AND THE FREE EXERCISE CLAUSE 136 (2001).

85. Most of these statutes have general exceptions for bona fide purposes consistent with both the general prohibition and medical use. *See, e.g.*, 21 U.S.C. § 841(a) (proscribing the distribution of controlled substances generally); 21 U.S.C. § 829(b) (excepting from the general proscription Schedule III substances, like Ritalin, when properly prescribed by a practitioner for medical use).

86. Blakeslee, *supra* note 82 at F1. Somewhat ironically, the Native American Church

benefit to peyote can be established, this may create a secular medical exception for peyote use—just like the secular medical exception in *Newark*—which may mandate a religious exception. *Smith* may be overruled, not because of a change in the constitutional test, but because peyote may turn out to be useful after all.

Smith, like *Newark*, illustrates the unprincipled nature of free exercise exemptions under the general applicability inquiry. As will be discussed in more detail in the next section, irrelevant factors seem to dominate the question whether a particular law creates secular burdens, thereby dominating the whole constitutional inquiry. This makes the entire Free Exercise Clause a sort of joke. One could say that any tension between *Newark* and *Smith*—the reason why an Islamic officer has a right to wear a beard in religious obedience, but a Native American has no right to engage in religious ritual—can best be explained by the fact that while not shaving is sometimes medically necessary, peyote never is.[87] This does not seem to be a proper way of doing constitutional law.

A. The Underlying Factors on Which the Constitutional Right Depends

As we have seen in our discussions of *Newark* and *Smith*, a

---

is now helping with a study on peyote for the National Institute on Drug Abuse. *See id.* (reporting how McLeans Hospital in Boston will conduct a study, financed by the National Institute on Drug Abuse, involving members of the Native American Church). There are ongoing discussions as to whether peyote might have other significant uses as well. *See* Lester Grinspoon & Rich Doblin, *Psychedelics as Catalysts of Insight-Oriented Psychotherapy*, SOCIAL RESEARCH, Sept. 22, 2001, at 677-78 (suggesting that peyote may have medical use as a psychotherapeutic agent); David O'Reilly, *Drugs Were His Door to the Sacred*, PHILA. INQUIRER, June 18, 2000, at J7. (reporting Huston Smith's spiritual encounters arising from peyote use).

87. As we discussed earlier, religious groups have tried a variety of approaches to ameliorate the perceived negative effects of the Supreme Court's decision in *City of Boerne v. Flores*, 521 U.S. 507 (1997). States have developed statutory and constitutional protections for religious observers. Congress too has reentered the fray by passing the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc.

Without being snide, the nature of the general applicability test is such that religious groups should recognize that they may have an interest in passing laws that do not directly give them exemptions. A strengthened version of the ADA that grafts medical exceptions onto every law may well open the door for religious practitioners to raise their free exercise claims. Given both the Supreme Court's current constitutional interpretation of the Free Exercise Clause and its propensity to prevent Congress from broadening its protection, it is not silly to suggest that an enhanced version of the ADA could help religious claimants more than a new version of RFRA. Of course, this should be taken with a grain of a salt, especially given that the Supreme Court's determination to limit Congress' ability to provide anti-discrimination rights is not confined to free exercise. *See, e.g.*, Univ. of Alabama v. Garrett, 531 U.S. 356 (2001) (holding that Title I of the ADA could not be supported under Section 5 of the Fourteenth Amendment).

religious petitioner's claim for an exemption from a law critically depends on what secular burdens the law creates. But, as we have seen, the secular burdens that a law creates are a random product of various factors, which often seem irrelevant to the constitutional question. It will then be unsurprising to learn that the test is often completely unresponsive to factors that most may think more relevant to the constitutional inquiry, such as the government's interest in denying an exception and the claimant's interest in receiving one.

1. Irrelevant Factors

The general applicability test puts center stage the existence of secular exceptions (and thus the existence of secular burdens) in determining whether a religious claimant should get an exception. From the discussions of *Newark* and *Smith*, we see that many factors can affect whether secular burdens arise from the challenged laws. It seems impossible to delimit the factors affecting the general applicability inquiry; it seems better just to summarize some observations.

Ultimately, whether secular burdens develop in response to any particular law will have much to do with the makeup of the relevant constituency where the law applies. In *Newark*, we saw that the religious exemption was due in part to the underlying incidence of the condition PFB, which in turn was due to the presence of an African-American population. If there had been fewer African-Americans in Newark,[88] the Islamic officers' religious claim would have failed. The existence of secular burdens is always going to hinge on what types of populations are present in the community. Different populations will have different secular burdens; in the case of *Newark*, an African-American community will be adversely impacted by a clean-shaven rule in a way that a predominantly Caucasian community will not. Consequently, Islamic officers—or a member of any religion that is forbidden from shaving (such as Hasidic Jews, for example)[89]—

88. African-Americans in Newark make up more than half of the city's population. *See* U.S. Census, *Quick Tables: Census 2000 Summary File 1* (2000), *available at* http://factfinder.census.gov/bf/_lang=en_vt_name=DEC_2000_SF1_U_QTP3_geo_id=16000US3451000.html. Nationally, African-Americans make up only 12.8% of the population. *See* U.S. Census, *Resident Population Estimates of the United States by Sex, Race, and Hispanic Origin* (2000) *available at* http://www.census.gov/population/estimates/nation/intfile3-1.txt.

89. For an interesting discussion of the topic, *see* Neal Conan, *Talk of the Nation: Politics of Hair* (NPR radio broadcast, Nov. 21, 2001) (discussing the biblical injunction against hair trimming followed in Hasidic circles). One potential Supreme Court case dealt

should think seriously about living in an African-American community before living with Caucasians.

Other cases, such as *Tenafly Eruv Association, Inc. v. Borough of Tenafly*[90] and *Rader v. Johnston*,[91] also expose the role that demographic factors can play in exemption analysis. In the *Tenafly* case, a group of Orthodox Jewish residents sought permission to attach lechis, which are thin black strips of plastic, along neighborhood utility poles. In doing so, the residents were attempting to create an eruv, a ceremonial demarcation of a particular area. Creating an eruv allows Orthodox Jews, who are usually forbidden from pushing or carrying objects outside their homes on the Sabbath, to conceive of the entire space within the eruv as their home. Without an eruv, Orthodox Jews who have small children or who are disabled cannot attend synagogue on the Sabbath.[92] The Third Circuit granted the residents a preliminary injunction against enforcement of an ordinance forbidding signs on public places because the rule was not enforced in a generally applicable manner. The Third Circuit relied upon the fact that, among other exceptions, the Borough had allowed orange ribbons to remain on utility poles during a controversy over school regionalization and the fact that residents often nailed their address number signs to utility poles.[93] As these exceptions were necessary to the result, the clear implication is, of course, that if the Orthodox Jews had lived in a community where people posted their address numbers over their doors and where the school district was not embroiled in political controversy, the Orthodox Jews living there would have no right to an eruv.[94]

Rader can be viewed in the same way. The plaintiff in *Rader* was an eighteen-year-old freshman at the University of Nebraska who wanted an exemption from the University's parietal rule that required

---

with a Hasidic Jew being required to shave his hair while in an Alabama prison, but certiorari was never granted. *See* Goulden v. Oliver, 442 U.S. 922 (1979) (Blackmun, J., dissenting from denial of certiorari).

90. 309 F.3d at 144 (3d Cir. 2002).

91. 924 F. Supp. 1540 (D. Neb. 1996).

92. *Tenafly*, 309 F.3d at 152.

93. *Id.* at 151-52.

94. I must confess that this discussion oversimplifies the case in *Tenafly*. The Borough made several other exceptions to the rule; it permitted local churches to post permanent directional signs, residents to post lost animal signs, and the local Chamber of Commerce to affix holiday displays. *Id.* at 151-52. My point, however, remains. All of the secular exceptions seem traceable to idiosyncratic factors about the Borough of Tenafly that may not exist in other communities. It seems instinctive to question the sense of an exemption system that makes religious claimants' rights contingent on such factors.

freshman students to live on-campus. Rader, believing that many of the things that went on in on-campus life were immoral and would threaten his spiritual life, wanted to live in the Christian Fellowship house. When the University denied his request, Rader sued.[95] The University's on-campus policy had three written exceptions, for students nineteen years or older, for married students, and for students living with their parents. There also was an individualized exception for those who could convince school administrators that an exception was really necessary.[96] Because of these exceptions, the district court held that the rule was not generally applicable and gave Rader an exemption to the University's rule. One wonders how Rader would have fared if he had lived in a time or place where there were few older, married, and commuting students. Of course, I do not mean to insinuate that Rader would necessarily have lost; universities will often have exceptions to their parietal rules even if they do not have a significant number of students demanding such exceptions because of the norms and expectations prevalent in larger society. Yet *Rader*, like *Tenafly*, demonstrates the very veiled, yet potentially powerful, way in which demographic factors can govern free exercise.[97]

Demographic factors are, of course, not the only factors that play into the constitutional analysis. Any factor that enters into whether secular burdens will develop is a potentially relevant factor in general applicability analysis. Our analysis of *Smith* and *Newark* shows that the state of medical knowledge can play a role in religious exemption analysis. In *Smith*, the lack of pharmacological benefits in peyote made its prohibition acceptable in the secular world. In *Newark*, lack of medical treatments for PFB made an absolute prohibition against shaving unworkable. Since the risk to human life and safety is one that is taken most seriously in society, it seems likely that the first exception a statute will have is an exception for medical reasons.

It should come as no surprise that there is real harm in this sort of exemptions analysis. One harm that should be flagged is that because

95. *See Rader*, 924 F. Supp. at 1543-44.

96. *See id.* at 1551-53.

97. *Rader* and *Tenafly* also illustrate another principle. Granting a religious exemption in *Newark* based on the secular medical exception made sense in at least one minor respect. There is a certain logic in analogizing a person's medical needs to another religious needs, even if that logic could not withstand scrutiny. In *Rader* and *Tenafly*, however, the incongruity between the existing secular exceptions and the religious claim is transparent even at first glance. It would take a clever commentator indeed to conceptualize the desire of school employees to post yellow ribbons as being similar to desire of Orthodox Jews to build an eruv.

the general applicability inquiry depends on so many demographic factors, results will vary in different populations. Aziz and Mustafa may be exempt from the no-shaving policy in Newark where there are significant numbers of African-Americans, but perhaps not in Idaho, where there are virtually none.[98] Orthodox Jews may have the right to build eruvs in communities that generally permit public postings, but not in others that forbid it. Such a constitutional test undermines the uniformity of the Constitution.

More obviously, however, the major complaint about this sort of exemptions analysis is that it makes no sense. To give a religious exemption to an Islamic officer to follow the teachings of the Qur'an because of the prevalence of an African-American skin condition violates our instinctive notions about how exemptions should be granted, as does denying a religious exemption to Native Americans to use peyote in their religious rituals simply because peyote has no known medical use. These irrelevant factors have no importance in themselves; nor (as we shall see) do they correlate with factors we may think are relevant to the constitutional analysis, such as the government's interest in denying an exemption or a claimant's interest in obtaining one.

2. Not Keyed To Important Interests

Since the general applicability test is keyed to irrelevant factors, it should come as no surprise that it is unresponsive to what might be considered the important factors in determining the appropriateness of a religious exemption. The state's interest opposing the grant of an exception and the religious claimant's in obtaining one are factors that neither appear explicitly in the general applicability calculus or that correlate well with its results.

a. The Government's Interest

The generally applicable requirement relies on a tacit assumption: the presence or absence of secular exceptions is a good indication of

98. The African-American population in New Jersey makes up 13.4% of the total population and over half of the population of Newark, while making up only 0.3% of the population in Idaho. *See* U.S. Census Bureau, *The Black Population: 2000*, *available at* http://www.census.gov/prod/2001pubs/c2kbr01-5.pdf. This means that the African-American population, per capita, is roughly forty times greater in New Jersey than in Idaho, and over one hundred and fifty times greater in Newark. In practical terms, this may make location decisive in an inquiry like the one in *Newark*.

the government's interest. On one level, this seems a sensible inference; the stronger the government's interest, the stronger its unwillingness will be to make secular exceptions in the rule. Similarly, if a governmental interest is weak, one could expect secular exceptions.

Yet these presuppositions are misleading, if not altogether untrue. There are many cases that involve a generally applicable statute where the government has only a weak interest in the statute's execution. Cases involving a religious objection to a government-ordered autopsy are excellent examples of this point.[99] In *Yang v. Sturner*, a case initially decided before *Smith*, a district judge awarded relief to a Hmong couple who brought suit against a medical examiner for doing an autopsy on their son without their consent. After *Smith* was decided, however, the district court reconsidered its decision and ruled, reluctantly, for the government. Though the judge found that the government had almost no interest in performing an autopsy and was ignoring the passionate emotional objections of the Hmong couple (and people generally), the district judge found that the Free Exercise Clause, under *Smith*, could not stop the autopsy.[100]

Yang is not an isolated case. In *Montgomery v. County of Clinton, Michigan*,[101] Sannie Montgomery refused to pull over when he was speeding. A high speed chase ensued, in which Montgomery lost

---

99. Such cases still arise even after *Smith*. *See, e.g.*, United States v. Hammer, 121 F. Supp. 2d 794 (M.D. Pa. 2000); Kickapoo Traditional Tribe of Texas v. Chacon, 46 F. Supp. 2d 644 (W.D. Tex. 1999); Montgomery v. County of Clinton, Michigan, 743 F.Supp. 1253 (W.D. Mich. 1990); Yang v. Sturner, 750 F.Supp. 558 (D.R.I.), *withdrawn*, 750 F.Supp. 558 (D.R.I. 1990).

100. Professor Laycock provides an excellent summary of the district judge's reflections in *Yang*:

> In *Yang v. Sturner*, a distressed district judge held that *Smith* left him powerless to do anything about an unnecessary autopsy performed on a young Hmong man. The judge movingly described the deep grief of the victim's family, the obvious emotional pain of the many Hmongs who came to witness the trial, and his own deep regret at being forced to uphold a profound violation of their religious liberty. He describes an autopsy done largely out of medical curiosity with no suspicion of foul play, with no authorization in Rhode Island law, and without the slightest regard for the family's religious beliefs. But under *Smith*, the state does not need a good reason, or even any reason at all.

Douglas Laycock, *The Religious Freedom Restoration Act*, 1993 BYU L. Rev. 221, 226 (1993). Laycock also noted the profound denigration inherent in an autopsy for many religious groups. "Several minority religions in America have strong teachings against mutilation of the human body, and they view autopsies as a form of mutilation. Faith groups with such teachings include many Jews, Navajo Indians, and the Hmong, an immigrant population from Laos. The Hmong believe that if an autopsy is performed, the spirit of the deceased will never be free." *Id.*

101. 743 F.Supp. 1253 (W.D. Mich. 1990).

control of his automobile and crashed it. Montgomery died as the police arrived. The police thought it obvious that the cause of Montgomery's death was the car crash—they were witnesses to Sannie's "having sustained massive head and upper body injuries" in the crash.[102] Montgomery belonged to a family of conservative Jews, who objected to an autopsy on religious grounds. They argued that an autopsy was unnecessary to determine cause of death because it was obvious. The state seemed to agree with this point, but insisted that an autopsy was mandated by state statutes, which required an autopsy case in all cases of violent death. The court permitted the state to conduct an autopsy, which apparently had no purpose given that there was no indication of foul play or use of drugs in the accident. The district judge called the decision "regrettable," but stated that under *Smith*, while "local officials making decisions concerning the care and disposition ought to proceed conscientiously and with great sensitivity to the emotional and religious sensibilities of the next of kind," there was no constitutional requirement that they do so.[103]

The best example of how the government will often insist on an autopsy without much of a reason is the *Hammer* case. *Hammer* is, in some ways, a typical autopsy case, where the plaintiff files suit for injunctive relief to stop the government from ordering an autopsy. The government alleges it has strong reasons that justify an autopsy; the plaintiff argues that an autopsy would be incompatible with his religious beliefs.[104] What differentiates *Hammer* from the rest of the autopsy cases, however, is the context. Hammer was a soon-to-be-executed federal inmate who was trying to prevent his own body from being autopsied after death. Hammer raised the obvious point: What interest did the government have in performing an autopsy to establish the plaintiff's cause of death when the government had just executed the plaintiff?[105] David Hammer won this case, as it was

102. *Id.* at 1255.

103. *Id.* at 1259 n.4.

104. United States v. Hammer, 121 F. Supp. 2d 794 (M.D. Pa. 2000).

105. The government's position, one must admit, is not as absurd as it seems at first glance. The government argued that it need to conduct an autopsy to protect itself from a lawsuit by Hammer's next of kin. The government was apparently worried that Hammer's next of kin might allege that Hammer may have been beaten before his execution. Hammer, however, said he was willing to swear a statement before his execution that he had not been abused by prison personnel, have photographs taken of his body to prove the lack of abuse, and have his execution videotaped. The government had no response to Hammer's proffers. In comparing the government's and Hammer's interests, the court only remarked that "Mr. Hammer's religious belief far outweighs the government's interest in an autopsy." *Id.* at 802.

decided under RFRA's compelling-interest standard,[106] but it seems that if it had been governed by the general applicability standard, Hammer may well have lost.[107]

These cases have a common theme: they all involve generally applicable statutes that requiring autopsies in broad categories of cases even when the government has almost no interest in an autopsy in the particular case at bar.[108] As a general matter, one tends to think that the governmental interest in the execution of a statute will be reflected in the amount and severity of the exceptions in that statute. As we have seen in the autopsy cases, however, this is a very weak tendency, if it exists at all.

Professor Volokh points out that the government can have a strong interest in the execution of a statute even when the statute has significant exceptions.[109] As the autopsy cases reveal, however, Volokh's point has an obvious contrapositive that is equally true. Just as statutes that serve strong governmental interests will often have exceptions, statutes that serve weak governmental interests will often be uniform. This effectively insulates them from judicial review insofar as the Free Exercise Clause is concerned, but that is not evidence of strong governmental interest.

Together, these two points damn the general applicability test. In short, the presence or absence of secular exceptions tells us virtually nothing about the strength of the governmental interest in denying the religious observer an exception. There may be cases where a strong governmental interest coincides with a uniform statute—and *Smith* may be an example—but there are many cases where that is not true. Take, again, a statute that generally requires autopsies to be performed. There may be strong or weak governmental interests behind any particular application of the statute. Sometimes the cause

106. Hammer was a federal inmate and the Third Circuit had already upheld RFRA as a matter of federal law. *See supra* note 26.

107. The statute requiring an autopsy is written in absolute form, but has an exception for a coroner's discretion. *See Hammer*, 121 F. Supp. 2d at 800-01 ("Immediately after execution, a postmortem examination of the body of the inmate shall be made at the discretion of the coroner of the county in which the execution is performed.").

108. Of course, there are times where the government may have a strong interest in performing an autopsy. *See, e.g*, Kickapoo Traditional Tribe of Texas v. Chacon, 46 F. Supp. 2d 644, 645 (W.D. Tex. 1999) (upholding the state's ordering of an autopsy of a Kickapoo Indian over the Tribe's objections because the cause of her death was unclear and her mother insisted that she had been murdered). My point is merely that the general applicability requirement makes no distinction between these cases.

109. *See* Volokh, *supra* note 56, at 1540 (noting that "virtually all laws, including those widely seen as aiming at quite serious harms" have secular exceptions).

of death is uncertain; sometimes it is clear. But by requiring an autopsy in every circumstance, the general applicability test reveals that it is completely unresponsive to the governmental interest at stake.

Courts have recognized the unresponsiveness of the general applicability inquiry. Before *Smith*, several exceptions existed in the compelling-interest test. Because of the innate governmental interest, the government usually had to meet only a reasonable standard in the prison, military, and tax contexts.[110] Despite the fact that *Smith* said nothing about these exceptions—a silence that seemed to infer that they were no longer necessary—most courts still insist that prison, tax, and military legislation face only limited scrutiny.[111]

These end runs around *Smith* makes sense as a way courts can make the Free Exercise Clause responsive to situations where the government has a strong interest, despite the unresponsive general applicability test. *Jackson v. District of Columbia*,[112] for example, dealt with a state prison policy requiring all inmates to shave in order to eliminate contraband, reduce gang activity, and maintain order. A class of plaintiffs challenged this policy, claiming their religions required them not to shave. The rule itself was generally applicable,

110. *See* O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987) (noting that a prison regulation that impinges on an inmate's constitutional rights is valid if it is reasonably related to legitimate penological interests); Goldman v. Weinberger, 475 U.S. 503, 506 (1986) (holding that free exercise rights in the military are diminished in light of the fact that "the military is, by necessity, a specialized society separate from civilian society"); Hernandez v. Commissioner, 490 U.S. 680, 699-700 (1989) (quoting United States v. Lee, 455 U.S. 252, 260 (1982)) (noting that the "'broad public interest in maintaining a sound tax system,' free of 'myriad exceptions flowing from a wide variety of religious beliefs'" justifies tax legislation even though it may infringe the free exercise rights of some claimants).

111. In the prison context, "most Courts of Appeals have taken the second approach, simply continuing to apply *Turner* and *O'Lone* in analyzing prisoners' constitutional rights." Levitan v. Ashcroft, 281 F.3d 1313, 1319 (D.C. Cir. 2002) (summarizing the separate Free Exercise Clause standard that should be applied in the prison context). In the tax content, one circuit court—following *Hernandez*—held that a tax burden could only violate the Free Exercise Clause through "the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes." Klaassen v. Commissioner, No. 98-9035, 1999 U.S. App. LEXIS 6320, at *10 (10th Cir. Apr.7, 1999) (quoting Madden v. Kentucky, 309 U.S. 83, 88 (1940)) (holding that a claimant who had ten children could not get an exemption from the tax scheme which gave certain exemptions only to those having eight or less children, even though the claimant's religion proscribed birth control). Lastly, *Goldman* has also been widely followed post-*Smith*. *See* Daniels v. City of Arlington, 246 F.3d 500, 503 (5th Cir. 2001) (holding that police officers had no right to wear religious pins, in part because uniform standards are "appropriate restrictions on the First Amendment rights of government employees").

112. 89 F. Supp. 2d 48 (D.D.C. 2000).

except for a medical exception allowing afflicted inmates to "grow facial hair up to half an inch in length."[113] The trial judge noted just how similar this case was to *Newark*, stating that "the grooming policy and medical exception at issue here are nearly identical to those considered in *Fraternal Order*."[114] This could have posed some difficulty for the trial judge—the increased governmental interest in the prison context did not seem to enter into the general applicability calculus. But the judge relied on the *O'Lone* doctrine, noting that there was one "pivotal difference" between this case and *Newark*: "the plaintiffs here are in prison."[115]

In summary, the general applicability inquiry is poorly attuned to the strength of the governmental interest. The presence or absence of exceptions is a poor proxy for governmental interest, and the fact that exceptionless statutes block free exercise claims absolutely means that even statutes representing weak governmental interests are constitutionally immune as long as they are uniform. The fact that the test is poorly calibrated with governmental interest also explains the persistence of ancillary doctrines in free exercise, such as the *O'Lone*, *Goldman*, and *Hernandez* doctrines, in which courts need to turn away cases where the general applicability test might otherwise mandate an exception.

b. The Religious Claimant's Interest

The general applicability inquiry relies on a loose proxy to represent the government's interest in a free exercise case: the presence or absence of exceptions in the legislative scheme. There is no corresponding proxy for the religious claimant's interest. There is not even a fiction that the religious claimant's interest is part of the general applicability analysis.

Smith itself is a perfect example. *Smith* was somewhat unlike many of the religious liberty cases that had come before the Supreme Court. Some of the Supreme Court cases addressed whether religious claimants had the right to worship in a particular place,[116] or to be free

113. *Id.* at 51.

114. *Id.* at 69. There are a surprising number of prison cases with facts very similar to *Newark*. They all come out in the government's favor. *See, e.g.*, Booth v. Maryland, 207 F. Supp. 2d 394 (D.Md. 2002) (holding that a Rastafarian had no constitutional right to wear dreadlocks in violation of the prison's policy because the medical exception applied only to the rule requiring no facial hair, not to the rule requiring a military-style haircut).

115. *Id.*

116. *See, e.g.*, Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439

of fiscal burdens that impacted their ability to worship.[117] Some cases dealt with the rights of protestors who objected to war on religious grounds;[118] others dealt with claimants who were in the criminal justice system,[119] or those that could have been said to have waived their rights by entering into military service or receiving some other governmental benefit.[120]

Without minimizing the importance of the religious claimant's interest in these cases, one can see that in *Smith*, there was something very serious at stake—nothing less than the ability of a whole people to practice a central ritual of their faith. With such an important issue at stake, one would think that part of the Court's analysis would evaluate Oregon's drug law in light of these strong religious interests. But, as many commentators have noted, the Court paid virtually no attention to the religious interest in the case. How could it? The general applicability test the Court laid out takes no notice of the religious interest. Contrast the analysis in *Smith* with that of *Yoder*. In *Yoder*, the Court went on and on about the deleterious effects that forced education would have on the Amish way of life. In *Smith*, the Court is noticeably silent on the impact its ruling will have on Native Americans because that impact is not relevant to the constitutional inquiry.

In fact, not only has the religious claimant's interest disappeared from the constitutional inquiry, the Court has emphasized how its disappearance is a step forward for religious exercise. The Court noted that the centrality of a claimant's belief is "not within the judicial ken," and stated, "It is no more appropriate for judges to determine the 'centrality' of religious beliefs before applying a compelling-interest test in the free exercise field, than it would be for them to determine the 'importance' of ideas before applying the

(1988) (permitting the government to allow timber companies to construct a road through a Native American sacred space).

117. *See, e.g.*, Bob Jones Univ. v. United States, 461 U.S. 574 (1983) (holding that the IRS' denial of non-profit status to a racially discriminatory school did not violate the Free Exercise Clause); United States v. American Friends Serv. Comm., 419 U.S. 7 (1974) (holding that Quaker employers had no right under the Free Exercise Clause to withhold portions of income taxes attributable to military purposes, despite their religious pacifism).

118. *See, e.g.*, United States v. Seeger, 380 U.S. 163 (1965); Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707 (1981); Gillette v. United States, 401 U.S. 437 (1971).

119. *See* O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987).

120. *See* Goldman v. Weinberger, 475 U.S. 503, 507 (1986); Bowen v. Roy, 476 U.S. 693 (1986).

compelling interest test in the free speech field."[121] Of course, centrality and importance are not quite the same thing, but they seem positively related. Neither, however, are of any importance in the general applicability regime that *Smith* sets up.[122]

3. *Smith*, Balancing, and the Cost-Benefit State

Over the last two sections, we have explored how the general applicability inquiry is unresponsive to the government's and the religious claimant's interest. Whether a law is generally applicable or not signifies little as to whether the government has a strong interest in giving an exemption to it, or whether the religious claimant has a strong interest in obtaining such an exemption.

In the *Sherbert* line of cases, the court used a compelling-interest test to determine whether to give an exemption. The court looked straightforwardly and directly at the government's interest and tried to balance it against the religious claimant's interest. The degree to which a religious exemption would compromise legitimate governmental goals was the cost of the exemption; the degree to which a religious exemption aided religious claimants in pursuing their spiritual goals was its benefit.[123]

---

121. Employment Div. v. Smith, 494 U.S. 872, 886-87 (1990).

122. There is no doubt that measuring a religious claimant's interest in an exemption was a difficult task; courts saw two chief harms in determining the centrality of a religious claimant's request for exemption. First, there was the harm that judges may mistakenly deny a religious claimant an exemption by believing that his religious claim is not central to his religion. Second, there was the harm of the centrality inquiry itself; many critics argued that it imposed an overly intrusive burden on the claimant. *See* David E. Steinberg, *Rejecting the Case Against the Free Exercise Exemption: A Critical Assessment*, 75 B.U. L. REV. 241, 291-94 (1995) (detailing these harms). Professor Steinberg, after considering these harms in detail, found them to be unpersuasive reasons for giving up on the centrality inquiry, arguing that it was not "as troubling as opponents of constitutionally compelled religious exemptions suggest." *Id.* at 293. As for the first harm, he notes that it seems strange to conclude that because some religious exemptions may be inappropriately denied, religious exemptions should therefore be categorically denied. As for the second harm, Steinberg notes that the religious claimant can weigh the emotional harm inherent in the centrality inquiry in deciding whether or not to bring a free exercise claim. It seems odd to argue that plaintiffs are better off by being prevented from bringing a claim at all.

123. Although it is a minor point, it is interesting to note that *Sherbert* was essentially a cost-benefit approach to religious exceptions. *Smith*'s renunciation of such an approach seems odd in a regulatory state dominated by cost-benefit analyses. *See* Exec. Order No. 12,866, 3 C.F.R. § 1993, *reprinted in* 5 U.S.C. § 601 (1994) (requiring governmental agencies to consider the cost-benefit ratio in regulation decisions); *see generally* COST-BENEFIT ANALYSIS: LEGAL, ECONOMIC, AND PHILOSOPHICAL PERSPECTIVES (Matthew D. Adler & Eric. A. Posner eds., 2001). In a society where the decision to regulate is so often made by an evaluation of the costs and benefits of regulation, it seems remarkable that the decision to exempt religious believers from the regulation pays *no* attention either to the cost or benefit of exempting religious believers. *See supra* section III(B)(2). A test

This leads to another criticism of *Smith*. One of the strongest justifications for the *Smith* decision was that it took the balancing of competing interests out of the hands of the judiciary. But the regime that *Smith* has set up still involves balancing. Before *Smith*, the judiciary would balance the religious interest directly against the state interest, in a cost-benefit sort of way. After *Smith*, the judiciary measures the religious and the state interests indirectly—by looking at the presence or absence of secular exceptions as indicative of the religious and state interests—and then tries to compare secular exceptions with a possible religious exception. Judges still balance factors after *Smith* just as much as they did before it—that is evident every time a judge tries to determine whether a religious exception does as much harm to the legislature's rule as an existing secular exception. The only thing that has changed is that now judges balance irrelevant factors—the "new" balancing pays no attention to the important concerns: the governmental and religious interest in granting or denying an exception.

IV. CONCLUSION

Commentators have viewed recent cases, like *Newark*, *Tenafly*, and *Rader*, with great optimism.[124] In the wake of *Smith*, these cases have given hope to many that a broad notion of the general applicability test will protect religious adherents from legislative hostility and indifference. Professor Duncan opened a recent article by remarking, "The Free Exercise Clause is the Mark Twain of Constitutional Law, because the recent report of its death 'was an exaggeration.'"[125]

I hope to dispel this optimism, or at least, suggest that it is exaggerated. While the new Free Exercise Clause may seem a principled way of instantiating a disparate-treatment right for religious believers into free exercise, it is really an unprincipled and bizarre manner of distributing constitutional exemptions. General applicability puts a premium on luck; Islamic officers must hope that they live in communities with skin conditions; Native Americans must hope peyote develops medical usefulness. Instead of granting or denying exceptions on the strength of the governmental and religious interests at issue, the general applicability requirement doles out exceptions in an almost completely random fashion. Free exercise can

---

less calibrated to cost-benefit factors could hardly be designed.

124. *See supra* note 76.

125. Duncan, *supra* note 30, at 850.

either grow into a full-fledged substantive right or devolve into a simple prohibition on intentional discrimination, but the current arrangement is a primitive attempt to split the difference that is completely out of accord with our intuitions and that will ultimately satisfy neither side.